Supreme Court, U. S.
FILED
OCT 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-678

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The Supreme Court Of California

JURISDICTIONAL STATEMENT

LOUIS E. GOEBEL
LUCE, FORWARD, HAMILTON & SCRIPPS
1700 The Bank of California Plaza
110 West "A" Street
San Diego, California 92101
Telephone: (714) 236-1414
Counsel for Appellant

October, 1979

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	4
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	6
STATEMENT OF THE CASE	6
HOW THE FEDERAL QUESTION IS PRESENTED	12
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	14
1. Probable Jurisdiction Should Be Noted Because Of The Pervasive Importance Of The Issues Presented	14
2. The Social Experiment Of The California Supreme Court In The *Agins* Case Has Effectively Repealed Private Property Rights In California	18
3. The Decision Below Is In Conflict With Federal Case Law And Prior Decisions Of This Court	20
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon,
24 Cal.3d 266 (1979) 3,12,13, 15,18,19

Armstrong v. United States,
364 U.S. 40 (1960) 23

Goldblatt v. Town of Hempstead,
369 U.S. 590 (1962) 4

Jacobson v. Tahoe Regional Planning Agency,
566 F.2d 1353 (9th Cir. 1978) 20

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,
___ U.S. ___, 99 S.Ct. 1171 (1979) 20

Lynch v. Household Finance Corp.,
405 U.S. 538 (1972) 25

Moore v. City of East Cleveland,
431 U.S. 494 (1977) 4

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 4,15,24

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 4,15, 23,24

Pumpelly v. Green Bay Co.,
80 U.S. (13 Wall.) 166 (1871) 24

Richmond Elks Hall Assn. v. Richmond Redevelopment Agency,
561 F.2d 1327 (9th Cir. 1977) 21,22

TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

United States v. Cors,
337 U.S. 325 (1949) 24

Village of Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926) 4

Watson v. City of Memphis,
373 U.S. 526 (1963) 24

CONSTITUTION

United States Constitution
Fifth Amendment 4,5,6,13, 14,17,20
Fourteenth Amendment 4,5,6, 14,20

STATUTES

Federal Statutes

28 U.S.C. Section 1257(2) 3

State Statutes

California Government Code
Sections 6950 *et seq.* 7
Sections 65910 *et seq.* 7
Section 65912 19

California Rule of Court 976 2

TABLE OF AUTHORITIES (Continued)

Page

STATUTES (Continued)

Municipal Statutes and Resolutions

San Diego Municipal Code
Section 61.0601 10

Resolution No. 207761 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. _____

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The Supreme Court Of California

JURISDICTIONAL STATEMENT

San Diego Gas & Electric Company, Appellant, (hereinafter sometimes "the property owner") appeals from the final judgment of the California Supreme Court entered August 22, 1979, denying Appellant a hearing to review the opinion of the California Court of Appeal, Fourth Appellate District, Division One, which held that a property owner may never bring an action in inverse condemnation seeking compensation in money damages for an unlawful exercise of the police power by a governmental entity, even though that action is excessive, arbitrary, unconstitutional, and denies the property owner all

use of its land. Appellant submits this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

On October 8, 1976 a judgment was entered in San Diego County Superior Court awarding money damages to the property owner. (Appendix A) The Findings of Fact and Conclusions of Law entered by the Court established as a matter of fact after full trial of the issues that the actions of the City of San Diego against the subject property constituted a taking without due process of law and just compensation within the meaning of the California and United States Constitutions. (Appendix A) An appeal was taken by the City of San Diego to the California Court of Appeal, Fourth Appellate District, Division One.

On June 13, 1978 the California Court of Appeal filed its opinion, modified on denial of rehearing (Appendix C), affirming the judgment in all respects. The opinion was certified for publication by the Court and was reported at 81 Cal.App.3d 844, 146 Cal.Rptr. 103. (Appendix B) When the California Supreme Court granted a hearing on July 13, 1978 (Appendix D), the opinion of the Court of Appeal was "superseded" pursuant to California Rule of Court 976 and is no longer deemed to be published.

The case was never heard by the California Supreme Court. After maintaining the matter on its docket without scheduling oral argument, on June 14, 1979 the California Supreme Court

entered an order (Appendix E) retransferring the case to the Court of Appeal, Fourth Appellate District, Division One, for reconsideration in light of its recent decision in *Agins v. City of Tiburon,* 24 Cal.3d 266 (1979). (Appendix F)

The California Court of Appeal, without additional briefing or oral argument, in an unpublished opinion dated June 26, 1979, directly and completely in contradiction to its previous opinion on the identical record, reversed the judgment of the trial court, finding that purported exercises of the police power, although arbitrary, unconstitutional, and denying the property owner all use of its land, do not require compensation. (Appendix G)

Appellant property owner's timely petition for rehearing to the Court of Appeal was denied by order filed July 9, 1979. (Appendix H) Appellant property owner's timely petition for hearing to the California Supreme Court was denied on August 22, 1979. (Appendix I)

JURISDICTION

A notice of appeal to this Court was duly filed in the California Court of Appeal, Fourth Appellate District, Division One (the Court having possession of the record of this case), on October 3, 1979 (Appendix J), appealing from the final judgment of the California Supreme Court. This appeal is being timely docketed in this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). Appellant charges that the City of San Diego by its purported regulatory actions, in designating property owner's land as open space under its General Plan, in combination with

its zoning actions, its acquisition efforts, and its entire course of conduct, has destroyed the value of the land, prevented all use, and has thereby taken Appellant's property without due process of law and without compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The judgment of the state court sustained the validity of these actions under the laws, ordinances, resolutions, and regulations of the City of San Diego and the State of California against the contention that they are repugnant to the Constitution of the United States.

Cases sustaining jurisdiction of an appeal to this Court from a judgment of a state court involving issues of whether a taking of private property has occurred and whether a property owner is entitled to compensation for the regulatory activities of a state or local government are the following: *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978); *Moore v. City of East Cleveland,* 431 U.S. 494 (1977); *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922).

QUESTIONS PRESENTED

1. Can a state court with impunity deny an aggrieved property owner its constitutionally mandated remedy of just compensation when a local government entity has

(a) imposed arbitrary, excessive, and unconstitutional land use regulations;

(b) commenced, but later abandoned direct acquisitive efforts under its power of eminent domain when its

public purpose was satisfied by the restraints of the purported regulations; and

(c) through a continuing course of conduct acted so as to deprive the property owner of all practical, beneficial or economic use of its property;

and the property owner has so established as a matter of fact after full trial of the issues?

2. Is not a remedy in money damages for inverse condemnation for a property owner aggrieved by oppressive regulatory activity under the guise of the police power mandated by

(a) sound public policy, as an indispensable check against the arbitrary and capricious excesses of local government land use regulation masquerading under the banner of the police power;

(b) an unbroken line of federal decisions, interpreting and applying the United States Constitution; and

(c) the express guarantees of the Fifth and Fourteenth Amendments to the United States Constitution?

3. Is the purported invalidation remedy proffered by the California state courts a constitutionally adequate substitute for just compensation where the conduct complained of by the property owner is not a single regulation, but a continuing course of conduct, including arbitrary and capricious planning and zoning activities, intertwined with acquisitive intent, and punctuated by abortive direct condemnation efforts?

4. Does either the purported social desirability of unfettered planning discretion or the potential inhibiting financial force of inverse condemnation damages warrant or permit the

California courts to deny a property owner just compensation for the taking of private property for public use as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States, as well as applicable portions of the California statutes and San Diego ordinances and resolutions are set forth in Appendix K.

STATEMENT OF THE CASE

Appellant in 1966 assembled a 412 acre parcel of land for possible future construction of a power plant. The property was zoned at the time of acquisition as M-I-A (industrial) and A-1-1 (agricultural holding), and the General Plan of the City of San Diego adopted in 1967 and reaffirmed through 1972, designated the property as industrial. The property that is the subject of this suit is approximately 206 acres of this parcel, 25 actually acquired from the City of San Diego in 1966. The land is located in the Sorrento Valley area of San Diego, in a relatively flat area at low elevation. A portion of it is subject to tidal action from the Pacific Ocean and other portions subject to "ponding" or standing water, due to poor drainage. The entire parcel has only sparse vegetation due to the soil's high salt content. The land is unoccupied except for utility lines.

Considerable industrial development took place in the Sorrento Valley area from 1966 through 1972. A January 1972

report, "San Diego Industry 1969-1990, A Planning Analysis," identified the Sorrento Valley area was one of the most desirable areas in the city for industrial expansion.

Commencing in early 1972, the City of San Diego began to formulate a plan to preserve and maintain open space in order to meet state statutory requirements.[1]

In March of 1972 the San Diego City Council met and asked the City Planning Director and the City Attorney to determine a schedule of areas that the City could preserve as open space by rezoning. Throughout 1972 the City's plans for acquisition of open space land continued, including discussions of an open space bond issue for the November election. The City Council in August of 1972 initiated a rezoning of the subject property in Sorrento Valley from M-1-A (industrial) to A-1-10 (agricultural holding) or other appropriate zone. The open space bond issue on the November 1972 ballot failed.

The General Plan of the City of San Diego was also being revised to provide for an open space element which State law required to be adopted by June 30, 1973. A portion of the subject property was designated as open space for public acquisition.

---

[1] The California Legislature in the late 1960's and early 1970's adopted a panoply of legislation pertaining to acquisition of "open space" land by local governments, which it declared to be a "public use" for which use of the power of eminent domain was authorized. (Government Code Sections 6950 *et seq.*) In 1972, legislation was enacted which required cities to adopt a General Plan with open space elements (Government Code Section 65302.2) and to adopt an open space zoning ordinance (Government Code Sections 65910-12). See Appendix K.

Concurrent with these changes in the General Plan, efforts were being made in the City's Community Development Department for the funding of open space acquisitions in preparation for a September, 1973 election. The acquisition cost of 120 acres of the subject land was estimated to be $900,000.

On April 17, 1973 the City Council adopted a resolution of public convenience and necessity, (Resolution No. 207761, Appendix K-8) and proposed a $22.5 million bond issue for acquisition of park reserve areas to be approved at the September, 1973 municipal election. No properties were specifically described, but the subject property was subsequently shown on maps publicizing the election as one of the properties to be acquired, as the trial court found and the California Court of Appeal affirmed. (Finding of Fact No. 24, Appendix A-7; original Court of Appeal Opinion, Appendix B-12).

In April, 1973 the Planning Commission held public hearings regarding the rezoning of property for "open space." The Commission recommended a downzoning of a portion of the subject property (approximately 39 acres) from industrial to agricultural, but recommended that a substantial portion (approximately 77 acres) remain designated as industrial and that a further segment (approximately 50 acres) be considered for future industrial use on the submission of a specific plan for development.

The Planning Commission scheduled its first public hearing on the new open space element to the City's General Plan for May 16, 1973. The plan as submitted proposed to designate only a portion of the subject property as open space, roughly the same portion as previously downzoned by the Planning Commission (approximately 39 acres). Because the proposed

plan was only made available to the public 24 hours before the hearing, a continuance was granted.

Representatives of the Planning Department and the Community Development Department realized at the time of the May 16 hearing that the plan did not conform to the plan being developed for the proposed bond issue. Revisions were made in an effort to coordinate the plans. The effect of the revision was to include the entirety of the subject property under the "open space" designation. When the continued hearing was held on May 23, 1973, the maps contained in the report, which was submitted to the Planning Commission and to the public, still erroneously reflected the earlier indication that only approximately 39 acres were to be designated as open space. No mention was made that the exhibits had been altered and, in fact, the property owner was unaware that a change had been made, and of the impact of that change on its property. The revised open space plan was adopted by the Planning Commission.

The City Council on May 30, 1973 received the report from the Community Development Department pertaining to the bond issue, entitled "Staff Report, Park Reserve Systems, April 29, 1973." The report designated substantially all of the subject property for acquisition as open space.

On June 7, 1973, the City Council accepted the recommendation of the Planning Commission and downzoned a portion (approximately 39 acres) of the subject property, but retained a substantial portion of the property in the industrial zone and retained a further portion as recommended for consideration as future industrial.

The new open space element of the City of San Diego's General Plan was presented to the City Council on June 19, 1973. The maps that were distributed to each member of the Council and the members of the public similarly contained the erroneous designation of the area to be included in the open space area, although the large scale wall maps had been corrected. No mention of the discrepancy was made on the public record. The open space plan was adopted as presented. The resultant effect was that the City Council designated as open space on June 19, 1973, property which it had only twelve days earlier specifically reviewed and recommended for retention in industrial zoning.

Testimony received from expert witnesses at the trial established that after the open space element was adopted, the land had no practical, beneficial or economic use, since no use which was consistent with the open space designation was economically or practically feasible.[2] The property at the time

---

[2] The definition of "open space" in the City's General Plan is: "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

San Diego Municipal Code section 61.0601 defines open space as: "any land or water area: (1) which is primarily in its natural state and has value for park and recreation purposes, and (2) which in the opinion of the City Council of the City, (a) conforms to the criteria established for open space land set forth in the 'Progress Guide and General Plan for the City of San Diego' as amended, and (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources."

There was testimony from expert witnesses that the City required zoning to be consistent with the General Plan.

of trial, and today, is devoted solely to public use as open space, the use for which acquisition was sought by the City. Since the imposition of the open space designation, no further efforts have been made by the City to acquire the property through direct exercise of its power of eminent domain.

The trial court found and the Court of Appeal affirmed that, as a matter of fact, it would have been totally impractical and futile for the property owner to have applied for approval of any development on the portion of the property designated as "open space." (Finding of Fact No. 32, Appendix A-8; original Court of Appeal opinion, Appendix B-12).

The trial court found that the actions of the City of San Diego were:

> "motivated to achieve a public purpose . . . were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial, or economic use of the property . . . and, therefore . . . constitute a taking without due process of law and just compensation within the meaning of the California and United States constitutions. . . ." Conclusion of Law No. 1, Appendix A-8.

The judgment of the trial court was appealed by the City, and originally affirmed by the California Court of Appeal, Fourth Appellate District, Division One. See Appendix B.

The California Supreme Court granted hearing but later retransferred the case back to the Court of Appeal to be

reconsidered in light of its recent decision in *Agins v. City of Tiburon,* 24 Cal.3d 266 (1979).[3]

The Court of Appeal on reconsideration reversed the judgment, holding that a property owner may never sue in inverse condemnation and seek compensation for the exercise of the police power by a government entity, even though the challenged regulations and actions are excessive, arbitrary, unconstitutional and deny the property owner all use of its land.

HOW THE FEDERAL QUESTION IS PRESENTED

Appellant in its complaint alleged that the actions of the City of San Diego leading up to and including the zoning of its property for agricultural and manufacturing, but including it within the open space designation of the General Plan of the City of San Diego, was a "tak[ing] of plaintiff's property for public use without compensation."

The San Diego County Superior Court found that the actions of the City "taken as a whole, constitute a taking of the portion of plaintiff's property designated as open space without due process of law and just compensation within the meaning of the California and the United States constitutions, and further constitute a damaging of the remainder of the larger parcel of plaintiff's property." Appendix A.

---

[3] Appeal of the *Agins* case to this Court has been docketed as 79-602. This case was a companion case with the *Agins* case at the California Supreme Court. When probable jurisdiction is noted in *Agins*, it may be desirable to consider the similarity of issues presented by these two cases. It is noted that while *Agins* is a pleading case, this case presents a full factual record after trial.

The Court of Appeal in its original review of the judgment found that the combination of the zoning of the property, its inclusion in the open space element, the City's policy of requiring consistency between zoning and the general plan, plus the City's efforts to acquire the land for open space had deprived the owner of the beneficial use of the land, concluding, "this is an example of inverse condemnation and the landowner should, under the Constitution, be compensated." Appendix B.

The California Supreme Court, after having granted a hearing in this case, rendered its decision in *Agins v. City of Tiburon,* 24 Cal.3d 266 (1979) in which it held:

> "A local entity's exercise of its police power which, . . . may exceed constitutional limits [does not] necessitat[e] the payment of compensation." 24 Cal.3d at 272.

Giving lip service to the fact that the Fifth Amendment of the United States Constitution prohibited the taking of private property for public use without just compensation, the Court nonetheless concluded, "the need for preserving a degree of freedom in the land use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuades us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief. . .", describing compensation as an "undesirable remedy." 24 Cal.3d at 274, 276-77.

When the Court of Appeal reconsidered the instant case, upon retransfer from the California Supreme Court, it reversed the judgment of the trial court (as well as "reversing" its own earlier opinion), finding,

> "A local entity's arbitrary unconstitutional exercise of the police power which deprives the owner of the beneficial use of his land does not require compensation; rather the party's remedy is administrative mandamus (*Agins v. City of Tiburon, supra,* 23 Cal.3d 605, 611.)" Appendix G-4.

Despite the urgings of Appellant in its petition for rehearing that the court's holding was a refusal to recognize appellant's federal cause of action based on the Fifth and Fourteenth Amendments of the United States Constitution, seeking compensation for arbitrary and unreasonable land use regulation, rehearing was denied.

The California Supreme Court likewise ignored appellant's urgings that the opinion below was a denial of its constitutional remedy of just compensation grounded on the Fifth and Fourteenth Amendments to the United States Constitution.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. Probable Jurisdiction Should Be Noted Because Of The Pervasive Importance Of The Issues Presented.

The case at bench presents the issue of the appropriate remedy when there has been an uncompensated taking of private property through the land use regulations of a governmental entity.

The increasing use of a variety of land use regulations, including the preservation of open space, on the theory that it is a physical, social, aesthetic, economic and ecological asset has created a whole new set of constitutional problems which must

be addressed by this Court. While past decisions of this Court have recognized in other areas of governmental action that regulation which goes too far is an unconstitutional taking for which just compensation must be paid (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)), the Court has not established the necessary constitutional guidelines in the area of land use regulations. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), this Court noted that the line of demarcation between permissible regulation and an unconstitutional taking, for which the government is "to pay," must be decided on the facts of each individual case.

However, the California state courts have now held that when any regulation is imposed in connection with land use planning, *i.e.*, a purported exercise of the police power--even if unlawful--even though *all* use is denied the property owner--no monetary compensation is ever available, and instead the property owner is restricted to possible invalidation of the regulatory action by seeking administrative mandamus or declaratory relief.

The California Supreme Court in *Agins v. City of Tiburon*, *supra*, 24 Cal.3d 366, the case which formed the basis for the opinion by the California Court of Appeal in this case, found that in the land use regulation area, policy considerations made inverse condemnation and compensation an "inappropriate and undesirable remedy," even where substantially "all use of the land" is forbidden. 24 Cal.3d at 274. The reason for such a rule, according to the Court, was to permit community planners flexibility in their work on the premise that the threat of "unanticipated financial liability" would intimidate and discourage them. 24 Cal.3d at 276. Such a view ignores that governmental actions and decisions in the land use regulation

area necessarily have *constitutional* consequences. The good intentions and nobility of the goals of preserving the environment and urban aesthetics by designating land as "open space" do not make actions achieving these goals immune from the constitutional mandate that private property cannot be taken for public use without payment of just compensation.

When a property owner is prohibited from using its land for any purpose except the public use of "open space," its land has been effectively "taken" and under the Constitution it is entitled to "just compenstion."

In the instant case the evidence at the trial proved that the land is unsuitable for agricultural use, unusable for residential or any similar purpose, and that its only possible use, industrial, is inconsistent with its designation as "open space," and would not be permitted by the City.

The trial court found that the actions of the City resulted in a "depriv[ation] of all practical, beneficial or economic use of the property" and therefore "constitute a taking . . . without due process of law and just compensation within the meaning of the California and United States constitutions. . . ." (Finding of Fact No. 29 and Conclusion of Law No. 1, Appendix A). Nonetheless, the California Court of Appeal found that this action "does not require compensation, rather the party's remedy is administrative mandamus." Appendix G-4.

If the decision in this case is allowed to stand, the result will be that all actions by state and local governments in the land use regulation area will be immune from the constitutional imperative that has governed the taking of private property for

all other public purposes, and that is fundamental to the preservation of private property rights.

The issues presented are obviously national in scope, and their resolution will have considerable social and financial consequences both for those who, like Appellant, own properties designated as "open space" and for all other owners of private property who may now or in the future be subjected to restrictive land use regulation. This Court has never intimated, let alone held, that the constitutional requirement of just compensation has any diminished application when private property is taken to preserve "open space" or for any other land use regulatory objective. It is plain, therefore, that this case properly raises substantial constitutional questions pervasive in scope and critical in effect, which urgently require this Court's resolution.

Appellant makes no assertion that all downzoning or rezoning to a less intense use is a basis for inverse condemnation, nor that the mere adoption of a restrictive general plan amounts to a "taking." What is challenged is the novel theory that land use regulations, valid or invalid, excessive or reasonable, somehow present different considerations than other regulation cases and thus no remedy in inverse condemnation or compensation is *ever* available. If this California theory of social expediency is allowed to stand, a substantial exception will have been carved out from the protection of the Fifth Amendment, and private property rights as they have been known for more than two centuries in this country will not be preserved in California.

2. The Social Experiment Of The California Supreme Court In The *Agins* Case Has Effectively Repealed Private Property Rights In California.

Justice Clark, dissenting in *Agins, supra,* captured the essence of the social experiment initiated by the California Supreme Court as follows:

> "Today's decision effectively pronounces that henceforth in California title to real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency exercising legislative power elects, without compensation." 24 Cal.3d at 282.

The California Supreme Court, apparently motivated by social expediency in "preserving a degree of freedom in the land-use planning function," and avoiding "the inhibiting financial force" of inverse condemnation (24 Cal.3d at 276), by judicial *tour de force* wrought a transformation of the concept of private property rights in California. Justice Clark quite astutely distilled the essence of the effect of the Court's holding, in noting that it is no longer accurate to characterize ownership of property in California as fee simple ownership, but rather that ownership of property in California is in trust from the applicable legislative body, along the lines of classical socialized property rights theory.

Justice Clark, again in his dissent in *Agins, supra,* directly and correctly pointed out the error of the majority's ways when it ignored or flaunted express federal constitutional authority to the contrary:

> "While the majority of this Court can finally declare that such a taking does not offend local constitutional prohibitions, their judgment does not foreclose federal constitutional examination. It is clear that compelling federal authority requires compensation for the taking alleged by plaintiffs in this case. The United States Supreme Court will hopefully adhere to Justice Holmes' admonition that 'we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'" 24 Cal.3d at 282.

Not only is the position of the California Supreme Court in *Agins* in contravention of federal constitutional law, but it is also unsupported by California legislation. The California legislature in enacting the open space legislation expressly limited its effect upon private property rights. California Government Code § 65912, Appendix K-4. Thus, the property owner's rights were trampled in two ways -- the California Supreme Court ignored controlling Federal law and did not even follow the dictates of its own state legislation.

The proffered substitute remedy is, in fact, a non-remedy -- no remedy at all.

In an attempt to justify its radical departure from precedent and its apparent contempt for the Supremacy Clause, the California Supreme Court suggested that the property owner's remedy was to seek invalidation of the offending regulations by administrative mandamus or declaratory relief. There is no authority for this proposition and the property owner in no way concedes that private property rights may be so diluted.

But even if the concept were acceptable, it is clear that, as a matter of fact, the purported substitute for just compensation is constitutionally inadequate. The case at bar well illustrates the sophistry of this approach. Despite the fact that the California Court of Appeal *twice* found a "taking" in the constitutional sense, it did not grant the property owner relief. Rather, more than six years after the twice conceded confiscation, after the property owner had already been subjected to *four* separate levels of judicial review, the court once again set the frustrated property owner adrift, like Diogenes, in search of its illusory remedy.

3. The Decision Below Is In Conflict With Federal Case Law and Prior Decisions Of This Court.

The prior decisions of this Court have made it clear that a property owner can maintain a federal cause of action in state court seeking compensation for arbitrary and unreasonable land use regulation. Only last term, this Court expressly held that such a cause of action could be stated against the Tahoe Regional Planning Agency, a bi-state regional agency with land use regulation powers. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* ___ U.S. ___, 99 S.Ct. 1171 (1979). The Ninth Circuit Court of Appeals, where the *Lake Country Estates* case was encaptioned, *Jacobson v. Tahoe Regional Planning Agency,* 566 F.2d 1353 (9th Cir. 1978), while dismissing the claim on the ground that the Regional Agency itself had absolute immunity from liability, did find that the property owner had alleged a cause of action and relied on the due process clauses of the Fifth and Fourteenth Amendments by using the term "taking." 556 F.2d at 1359 n. 9. On appeal, this Court reversed, finding no absolute immunity, specifically

noting that it found sufficient allegations of deprivation of federally guaranteed rights under color of state law. 99 S.Ct. at 1176-77.

Richmond Elks Hall Assn. v. Richmond Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977) illustrates the prevailing view of federal courts with respect to recovery of money damages for interference with property rights by the exercise of the police power:

> "When a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of property, the result is a taking in the constitutional sense and *compensation must be paid.* [Citations omitted.]
>
> '[T]o constitute a taking under the Fifth Amendment it is not necessary the property be absolutely "taken" in the narrow sense of that word to come within the protection of this constitutional provision; it is sufficient if the action by the government involves a direct interference or disturbance of property rights. *Pumpelly v. Green Bay Co.*, [80 U.S.] 13 Wall. 166, . . .; *United States v. Lynah*, 188 U.S. 445 . . .; *United States v. Cress*, 243 U.S. 316. . . . Nor need the government directly appropriate the title, possession or use of the properties. . . .' [Citation omitted.]
>
> . . . .
>
> [W]e conclude that Agency's interference with Elks' property rights was direct and substantial, and that the result of this interference was a significant reduction in the value of the subject

> property. Therefore, we hold that Agency effected a *compensable taking* under the Fifth and Fourteenth Amendments of the United States Constitution." 561 F.2d at 1330-31. (Emphasis added.)

Moreover, the court in the *Richmond Elks* case expressly rejected an argument that there could be no liability for government actions taken pursuant to the police power:

> "Regarding Agency's argument that it acted pursuant to the police power of the State and therefore is not liable for its taking of Elks' property, we observe that the very authority cited by Agency, *Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), refute its contention. Berman* involved the rights of property owners whose properties were taken by a redevelopment agency pursuant to the exercise of the State's police power. Under such circumstances the Court observed that '[t]he rights of these property owners are satisfied when they receive that just compensation which Fifth Amendment exacts as the price of the taking.' *Id.* at 36, 75 S.Ct. at 104. It is clear from *Berman* that a governmental agency acting pursuant to the State's police power must pay just compensation for any taking it effects. Therefore, assuming *arguendo*, that Agency in the instant case exercised legitimate police power, it still must pay for its taking of Elks' property." 561 F.2d at 1332.

Prior decisions of this Court, considering government conduct in relation to private property rights, have made it plain that the actions of governmental entities which effectively preclude the property owner from using its land, accomplishing

a public purpose, without providing just compensation, are constitutionally impermissible.

In *Armstrong v. United States,* 364 U.S. 40, 49 (1960) this Court explained:

> "The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Justice Holmes observed in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922) that while the government could not survive if it was required to pay for every change, nonetheless there must be limits to the exercise of the police power or the due process clause would be gone:

> "When it reaches a certain magnitude, . . . there must be an exercise of eminent domain and compensation to sustain the act. . . .
>
> . . . .
>
> [T]he natural tendency of human nature is to extend the qualifications more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public

> condition is not enough to warrant achieving the desire by shorter cut than the constitutional way of paying for the change." 260 U.S. at 413-15.

The *Pennsylvania Coal Co.* case was approvingly cited by this Court recently in *Penn Central, supra,* 438 U.S. 104, as holding that a state statute which furthers important public policies may nonetheless so frustrate the economic expectations of the owners as to amount to a "taking." This Court in *Penn Central* further noted that such injuries caused by the government action are to be "compensated" for, and the government is "*to pay* for any losses proximately caused by it. . . ." 438 U.S. at 124. (Emphasis added.)

While the explanation for the illicit constitutional reformation attempted by the California courts may lie largely in the well-publicized financial implications of Proposition 13, which has produced an era of fiscal conservatism throughout the state, neither affluence nor penury determines the reach of basic constitutional guarantees. This Court long ago recognized that the "political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice." *United States v. Cors,* 337 U.S. 325, 332 (1949). The right to receive just compensation for private property that has been taken for public use has long been exhaulted as an essential protection against governmental abuse and discrimination, (*Pumpelly v. Green Bay Co.,* 80 U.S. (13 Wall) 166, 177-78 (1871)); and the "vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. City of Memphis,* 373 U.S. 526, 537 (1963).

CONCLUSION

This Court has eloquently stated its concept of private property rights and the protections to which they are entitled under the Constitution:

> "[T]he [supposed] dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

A view totally repugnant to this Court's mandate holds sway in California today. Private property rights are being "judicially reformed" into feeble privileges or less and controlling federal law essential to the preservation of the fundamental constitutional right in property is being ignored by the California courts. This Court's intervention is urgently required.

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

LOUIS E. GOEBEL

LUCE, FORWARD, HAMILTON & SCRIPPS

Counsel for Appellant

October, 1979